IN THE

ARIZONA COURT OF APPEALS

DIVISION ONE

CRST INTERNATIONAL, *Petitioner Employer*,

INDEMNITY INSURANCE CO OF NORTH AMERICA, *Petitioner Insurance Carrier,*

v.

THE INDUSTRIAL COMMISSION OF ARIZONA, *Respondent,*

GURDON MCCHESNEY, *Respondent Employee*.

No. 1 CA-IC 21-0049
FILED 10-06-2022

Special Action - Industrial Commission
ICA Claim No. 20201600007
Carrier Claim No. CGL163282A
The Honorable Paula R. Eaton, Administrative Law Judge

AFFIRMED

COUNSEL

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OPINION

Judge Samuel A. Thumma delivered the opinion of the Court, in which Presiding Judge Maria Elena Cruz and Judge Michael J. Brown joined.

T H U M M A, Judge:

¶1 This case turns on whether a traveling employee, who suffered a head injury while on a break performing a personal errand on a customer's property, sustained an injury compensable under Arizona's Workers' Compensation Act. An Industrial Commission of Arizona administrative law judge (ALJ) found the employee was within the course of his employment and awarded benefits. For the reasons set forth below, that award is affirmed.

FACTS AND PROCEDURAL HISTORY

¶2 Gordon McChesney has worked as a truck driver for CRST International for many years. His job is to pick up large bales of cardboard at retail stores in the Phoenix area and northern Arizona. This involves day trips, driving a flat-bed truck to the stores, using a forklift to load the bales on the truck and then taking the bales to Phoenix for recycling. One weekly route required McChesney to drive from Tolleson to stores in Flagstaff and north Phoenix before returning to Tolleson. McChesney was injured in April 2020 while on this Flagstaff route.

¶3 On the day of his injury, McChesney got a late start because his truck was being repaired. Although typically on the road by 7:00 a.m., that day, McChesney left at about 10:30 a.m. He arrived in Flagstaff at about 1:30 p.m. and loaded cardboard bales on his truck at the first of three stores. He then took a quick break and headed to the store's front entrance to buy biscuits for his two dogs at home. He drove the forklift from the back of the store, along an empty sidewalk on the side of the store, toward the front entrance. Along the way, he ran over a large rock on the sidewalk that jolted the forklift and caused him to hit his head on the protective cage. The forklift swerved, tilting but not tipping over, causing McChesney to again hit his head on the cage. After stopping the forklift, McChesney got out, collapsed and passed out. A police officer nearby called an ambulance, and another passerby helped. McChesney was treated in a hospital emergency room and a family member then drove him back to Phoenix.

¶4 McChesney filed a workers' compensation claim, which was denied. CRST and its carrier Indemnity Insurance Company of North America argued McChesney was outside the course of his employment when he was injured. They viewed the injury as not compensable because McChesney was on a personal errand and was prohibited from going into the store or using the forklift for transportation.

¶5 At an evidentiary hearing, the ALJ heard testimony from McChesney and CRST's safety manager, general manager and operations manager. McChesney testified that he often used the forklift for transportation to the front of stores to use the restroom or buy food. He added that other CRST drivers similarly used forklifts, and he had never seen a rule prohibiting such use. He also testified that he wanted to quickly buy the dog biscuits because his late start meant he would get back to Phoenix late, sometime after 8:00 p.m. McChesney admitted his primary purpose for wanting to go into the store was to buy dog biscuits, adding he also might have gotten something to drink.

¶6 CRST's safety manager testified that employees were generally allowed to take breaks and go into stores to use the restroom or get food and drink. CRST's general manager testified that employees could take breaks and go into a store and shop while "off duty." He added, however, that they could not use forklifts for transportation. CRST's witnesses agreed that unwritten company rules prohibited using forklifts for transportation. CRST's safety manager, however, admitted he had used forklifts for transportation to the front of a store to get food a few times.

¶7 In April 2020, retail stores were reacting to the COVID-19 pandemic. The store where McChesney was injured tried to limit the number of in-store face-to-face interactions, telling CRST that paperwork would be handled electronically. CRST's operations manager testified that this "no-touch" policy was communicated to CRST drivers by text message, directing that drivers should only go into stores to use the restroom or get food or drink. McChesney, however, testified he never received such a text message and CRST's operations manager admitted that he did not confirm McChesney received the text.

¶8 After considering the evidence, the ALJ found McChesney's injury was compensable. She found McChesney credible when he denied receiving the "no-touch" policy text message. She also found using a forklift to drive to the front of the store was "not out of the ordinary" for CRST employees. Finally, she found McChesney's use of the forklift to drive to the front of the store to shop while on a break was not "a clear violation of

a work rule or so out of the ordinary as to constitute a deviation from his employment."

¶9 After the ALJ affirmed the award on administrative review, CRST and Indemnity timely filed this statutory special action. This court has jurisdiction under A.R.S. §§ 12-120.21(A)(2) and 23-951(A) and Arizona Rule of Procedure for Special Actions 10.

DISCUSSION

¶10 This court reviews "questions of law de novo" but defers "to the ALJ's factual findings," *Special Fund Division v. Indus. Comm'n*, 252 Ariz. 267, 269 ¶ 6 (App. 2021), viewing the evidence in a light most favorable to upholding the award, *Lovitch v. Indus. Comm'n*, 202 Ariz. 102, 105 ¶ 16 (App. 2002). The ALJ, not this court, "resolve[s] all conflicts in the evidence and draw[s] all warranted inferences." *Aguayo v. Indus. Comm'n*, 235 Ariz. 413, 416 ¶ 11 (App. 2014).

¶11 To prevail on his claim, McChesney "needed to show that he suffered an injury 'by [1] accident [2] arising out of and [3] in the course of his employment.'" *Turner v. Indus. Comm'n*, 251 Ariz. 483, 485 ¶ 8 (App. 2021) (quoting A.R.S. § § 23-1021(A)). Whether an injury meets this standard turns on the totality of the circumstances. *Finnegan v. Indus. Comm'n*, 157 Ariz. 108 (1988). McChesney's injury was an accident, and Petitioners do not dispute that the injury arose out of his employment. *See Ibarra v. Indus. Comm'n*, 245 Ariz. 171, 174 ¶ 14 (App. 2018) (noting "arising out of" and "in the course of" "are interrelated, but each must be evaluated and satisfied separately") (citation omitted). Petitioners, however, claim McChesney's injury was not "in the course of" his employment.

¶12 "'[I]n the course of' refers to the time, place, and circumstances of the injury in relation to the employment." *Turner*, 251 Ariz. at 485 ¶ 8 (citing cases). "The type of activity which most clearly satisfies the '[in the] course' test is the active performance by the employee of the specific duties which he was engaged to perform. A 'weaker' class of activity -- that is, which does not so clearly meet the '[in the] course' test or may fail to meet it altogether -- includes those activities which are only incidental to the performance of the employee's duties, such as seeking personal comfort." *Royall v. Indus. Comm'n*, 106 Ariz. 346, 350 (1970).[1] "An

[1] The "personal comfort" doctrine provides "that employees who engage in reasonable acts which minister to their personal comforts remain within the

injury which occurs in the course of the employment will ordinarily, but not necessarily, arise out of it, while an injury arising out of employment almost necessarily occurs in the course of it." *Royall*, 106 Ariz. at 349 (citation omitted). "The 'ultimate test' is whether 'the totality of circumstances establishes sufficient indicia of employment connection.'" *Noble v. Indus. Comm'n*, 188 Ariz. 48, 51 (App. 1996) (citation omitted).

¶13 The analysis applicable to McChesney -- a traveling employee with an injury involving unusual facts -- builds on *Bergmann Precision, Inc. v. Indus. Comm'n*, another traveling employee case. 199 Ariz. 164 (App. 2000). In *Bergmann*, after starting the work day with a brief office visit, the employee drove around the Phoenix area making sales calls. *Id.* at 165-66 ¶¶ 1-5. Although not an overnight traveler, the employee spent most of his work time traveling. *Id*. One day, while illegally jaywalking to his car after eating lunch alone, the employee was hit by a car and seriously injured. 199 Ariz. at 165 ¶ 6 & n.1.

¶14 Affirming an award finding the injury occurred in the course of employment, *Bergmann* found the "continuous coverage" that applied to overnight traveling employees also applied to daily traveling employees. 199 Ariz. at 166 ¶ 7, 167 ¶ 13. *Bergmann* noted that when "travel is essentially part of the employment, the risk [of injury during activities necessitated by travel] remains *an incident* to the employment even though the employe[e] may not actually be working at the time of injury." *Id*. at 167 ¶ 13 (citations omitted). In "choosing to eat at a restaurant near his intended route," the employee "neither abandoned the course of his employment nor created a wholly personal risk of injury." *Id*.

¶15 Rejecting an argument that illegal jaywalking was "a deviation from the course of employment," *Bergmann* defined "deviation" as "activity . . . 'so remote from customary or reasonable practice that . . . [it] cannot be said to be [an] incident[] of the employment.'" 199 Ariz. at 170 ¶ 19 (quoting 2 Arthur Larson & Lex K. Larson, LARSON'S WORKERS' COMPENSATION LAW § 21.08[1], at 21-43 (2000)). Although illegal and hazardous, *Bergmann* noted that jaywalking was "not such an unusual or abnormal activity that it necessarily constitutes a deviation from employment." *Id*.

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course and scope of employment, and may be compensated for resulting injuries which can be said to arise out of the employment." *Sacks v. Indus. Comm'n*, 13 Ariz. App. 83, 84 (1970) (citations omitted). Although the ALJ mentioned the doctrine, for the reasons discussed, it is not dispositive here.

¶16 In doing so, *Bergmann* distinguished *Rodriguez v. Indus. Comm'n*, 20 Ariz. App. 148 (1973). 199 Ariz. at 170 ¶ 18. *Rodriguez* affirmed the denial of benefits for a copper mine employee who was injured while walking an unauthorized path that was "dangerous, foolhardy and negligent at best," looking for aspirin on a break. 20 Ariz. App. 148, 149 (1973). Focusing on where the employee was injured, *Rodriguez* stated the employee "certainly was not there on his employer's business," adding when an employee is injured "while engaged in acts for his own purposes or benefits, other than acts necessary for his personal comfort and convenience while at work, such injury is not in the course of his employment." *Id.* at 150-51. As *Bergmann* noted, the actions by the employee in *Rodriguez* were "a deviation from the course of employment and create[d] a wholly personal risk." 199 Ariz. at 170 ¶ 19.

¶17 *Bergmann*, *Rodriguez* and other Arizona cases collectively provide that conduct of a traveling employee -- either overnight or daily -- during work is "in the course of" employment unless it is a "substantial deviation" from that employment. *See, e.g.*, *Bergmann,* 199 Ariz. at 168 ¶ 14 & n.5 (affirming award of benefits where there was no "substantial deviation" from employment; "it was not a deviation at all"); *Joplin v. Indus. Comm'n*, 175 Ariz. 524, 528 (App. 1993) (affirming denial of benefits where evidence "established a substantial deviation" from employment); *Mustard v. Indus. Comm'n*, 164 Ariz. 320, 322 (App. 1990) (vacating award denying benefits, which improperly concluded the employee's conduct "was a substantial deviation from her job"); *Anderson Clayton & Co. v. Indus. Comm'n*, 125 Ariz. 39, 42 (App. 1979) (vacating award granting benefits where "horseplay" was "a substantial deviation from the place and duties of . . . employment"); *see also Gurovich v. Indus. Comm'n*, 113 Ariz. 469, 472 (1976) (vacating denial of benefits and adding that driving a different route would "be one factor in considering whether there has been such a sufficiently substantial deviation so as to take the employee out of the course and scope of his employment"); *Jaimes v. Indus Comm'n*, 163 Ariz. 307, 310-11 (App. 1990) (vacating denial of benefits and expressing uncertainty about whether Arizona used "substantial deviation," but concluding employee "did not substantially deviate").

¶18 Applying this "substantial deviation" standard, Petitioners argue that McChesney substantially deviated from his employment, meaning his injury was not "in the course of" his employment. Petitioners base this argument on three assertions: (1) the employer's "no-touch" policy prohibited McChesney from entering the store to shop for personal items; (2) McChesney was prohibited from using the forklift as a means of travel;

and (3) McChesney was performing a purely personal errand. Applying the "substantial deviation" standard, Petitioners' arguments fail.

¶19 The ALJ found, and the record supports, that McChesney was unaware of any "no-touch" policy. Thus, McChesney did not knowingly violate a company rule by trying to go into the store. *See Rodriguez*, 20 Ariz. App. at 149 (finding employee "had not received permission to leave his 'work area' and that [his actions] violated a company rule"); *see also Downes v. Indus. Comm'n,* 113 Ariz. 90, 91 (1976) (noting finding that "the evidence fails to establish that the [employee] was cognizant of the employer's rules which he violated"); *Goodyear Aircraft Corp. v. Gilbert*, 65 Ariz. 379, 384 (Ariz. 1947) (noting, even where company rule could make injury noncompensable, "the violated rule must be one of which the employee is cognizant"). Moreover, even if CRST had notified McChesney of the "no-touch" policy before his injury, that policy did not prevent CRST employees from going into stores to use the restroom (or, presumably, to get food or drink). And McChesney testified that he might have gotten something to drink, along with dog treats, in the store.

¶20 The ALJ also found, and the record also supports, that CRST employees used forklifts for transportation to the front entrance of large stores. The ALJ properly found that using the forklift for transportation did not "appear to be out of the ordinary." McChesney's use of the forklift was not unreasonable because it would allow him to return to his driving duties more quickly than if he walked. Nor does the record show that his use of the forklift for that purpose was typically dangerous or, given similar prior usage, violated a company rule that was communicated and enforced. *See Goodyear*, 65 Ariz. at 384 (noting "the violated rule . . . must be a rule that is in use, applicable to this employee, and enforced").

¶21 Finally, although McChesney was performing a personal errand when he was injured, that is not dispositive. As previous cases have noted, a traveling employee stays within the course of employment absent conduct that is a "substantial deviation" from that employment. *See, e.g.*, *Bergmann,* 199 Ariz. at 168 ¶ 14 & n.5. McChesney took a short break and went from one area of the customer's large property where he was working to another area on the same property to buy personal items. CRST's general manager acknowledged that employees were free to shop on their breaks at stores where they were working, and that the timing of such breaks was in the employee's discretion.

¶22 Petitioners cite several cases in claiming McChesney's conduct was an "extreme" deviation from his employment. Unlike

McChesney, in two of those cases, the employees were injured while violating employer rules that had been communicated to the employees. *See Scheller v. Indus. Comm'n*, 134 Ariz. 418, 419 & 421 (App. 1982) ("Where the employer instructs the employee to do one thing in a particular situation and he does the other, we cannot say his actions are reasonable under the circumstances."); *Thomas v. Indus. Comm'n*, 54 Ariz. 420, 428 (1939) ("where the employee was in a place from which he had been excluded by the direct and positive instruction of his employer," the employee is not acting "in the course of" employment). Another case Petitioners cite vacated the denial of benefits even when the employee violated the employer prohibitions. *See Burnett for Burnett v. Indus. Comm'n*, 158 Ariz. 548, 549-52 (App. 1988) (setting aside denial of benefits where employee violated employer policy by throwing merchandise at a customer, cursing at a customer and then fighting the customer, even where the award found the employee would not have been injured had he complied with the employer policy). Petitioners are incorrect in arguing that, once McChesney loaded the bales on the truck, he had "finished his work" and should have "return[ed] home." Among other things, driving to other stores on the route, picking up bales there and then driving back to the Tolleson base remained a part of his work day. Even if the injury had not occurred, McChesney remained on the job as a traveling employee until he returned to the Tolleson base.

¶23 Nor does Petitioners' reliance on *Gurtler v. Indus. Comm'n*, 237 Ariz. 537 (App. 2015) and *Connors v. Parsons*, 169 Ariz. 247 (App. 1991) alter the analysis. Both cases applied the "going and coming rule," which provides that "[a]ccidents that occur when an employee is going to or from work ordinarily are not within the course of employment." *Connors*, 169 Ariz. at 251; *accord Gurtler*, 237 Ariz. at 539. The "going and coming rule," however, applies when "'the employee has a definite place and time of work.'" *Connors*, 169 Ariz. at 251 (citation omitted); *accord Gurtler*, 237 Ariz. at 539-40. McChesney, by contrast, is a traveling employee and was injured before he returned to the Tolleson base and completed his workday. *See Gurtler*, 237 Ariz. at 539 (noting workday ends when "all the work required" is finished and the employee "leaves the place of business . . . to go . . . home") (citation omitted).

¶24 If there was any deviation from employment by McChesney's attempt to buy dog biscuits, it was slight. On this record, the ALJ properly could conclude that McChesney's conduct was not a "substantial deviation" from customary or reasonable practice such that it was outside "the course of his employment."

CONCLUSION

¶25 Because Petitioners have shown no error, the award is affirmed.

AMY M. WOOD • Clerk of the Court
FILED: JT